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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 824

ADA J. VANT and WALTER J. VANT, Petitioners,

v.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation, Respondent.

PETITIONERS' REPLY BRIEF

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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In the respondent's brief in opposition, there is an attempt in the counter question presented (p. 1) to impress this Honorable Court with the false impression that the Amendment to the Complaint was erroneously filed because "without leave of court or consent of the defendant". Nevertheless, it is readily obvious how untenable is this proposition from an examination of the opening clause of Rule 15(a) *quoted by respondent* (p. 2) which provides, "a party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . ."; and it is plain from the record that a responsive pleading has not been served and that the said amendment was the only one.

The inapplicability herein of Rule 12(f) quoted by respondent (pp. 1-2) is manifest from the discussion of the applicable Rules in Reason 1 for allowance of the writ (Petition 12-14).

The respondent's opening statement in its counter Statement of the Case (p. 3) is inaccurate, and yet respondent persuaded the lower courts that it was true. The petitioners are not "the beneficiaries of a policy of insurance upon the life of their deceased husband and father, . . ., which provided . . .". *The petitioners are the owners of an Interest Income Certificate.* In order to avoid the repetition of that misstatement before this Honorable Court, petitioners clarified those facts at the top of page 19 of the Petition in bold face type, as follows:

> **"The arrangements made by the insured with the insurance company have never been a subject for consideration in the proceedings below, because the insurance contracts went out of existence upon the death of the insured at which time a new and separate thing came into existence — the Interest Income Certificate."**

Contrary to respondent's footnote on page 5, it is respectfully submitted "that the submission as on the merits was conditioned". The minutes appended (p. 9) by respondent were not intended as a Transcript of the proceedings and are not. The only record to be considered on this point is the opening paragraph of the Opinion of the Court (App. 1-2), which is as follows:

> "When this matter came before us for hearing on appellee's motion to dismiss the appeal and the countering motion of appellants to remand with instructions, it became apparent that counsel for both parties were addressing themselves, in substantial part at least, to the merits of the issue presented by the appeal. Accordingly, it was stipu-

lated in open court that at the conclusion of argument the case should stand submitted on the merits of the appeal as well as on the motions. In this connection counsel for appellant strongly urged the relevancy of briefs and records on the prior appeal on this case. Vant v. Mutual Benefit Life Ins. Co., 1958, 255 F.2d 263. We have examined and considered these items."

An incidental correction of said minutes should change Attorney Helwig's statement from "costs are $500" to the "attorneys' fees" applied for by respondent (and refused) were $500.

This is the first time that the respondent has denied that the said submission was conditioned as stated in the petition (pp. 3, 11); and it was previously so alleged below in appeal No. 12,777 both in the Petition for Rehearing and in the Motion for Argument of Appeal on the Merits. However, this proposition of respondent is wholly without merit at any rate because the submission on the merits was necessarily conditioned as stated by petitioners if only by reason of the Canons of Judicial Ethics cited on page 18 of the Petition. In respondent's denying that the stipulated submission to the Court of Appeals on the merits was conditioned upon your petitioners receiving full consideration of all of their points and authorities based upon the entire record, is the respondent not advocating that your petitioners as appellants were not to receive full consideration of their appeal and all of their points and authorities based upon the entire record? *In other words, is not the respondent arguing that petitioners' contended denial of full con-*

sideration of their appeal was the result of respondent's own trick, and that the slick trick is not now reviewable?

The Order by Circuit Judge Hastie of June 9, 1958, appended (p. 11) by respondent shows that leave to file the supplemental appendix was granted. It consisted of the very Amendment to the Complaint which was subsequently ordered stricken by District Judge Sorg.

Respondent's entire Argument (pp. 6-8) can be disposed of by replying that the citations do not support the propositions, and the propositions are impertinent to the questions presented.

CONCLUSION

The respondent's opposing brief fails to comply with paragraph 1 of Rule 24 because it does not disclose "any matter or ground why the cause should not be reviewed by this Court."

Respectfully submitted,

PAUL GINSBURG
Counsel for Petitioners.